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Attorney for Beau Thomas Upton

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BEAU THOMAS UPTON,

Defendant.

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No. 4:17-cr-06041-SMJ-1

SENTENCING MEMORANDUM
& REQUEST FOR VARIANCE

SUMMARY

On July 22, 2020, the defendant appeared before U.S. District Judge Salvador Mendoza, Jr. and entered a guilty plea to Count 1 of the indictment, Production of Child Pornography.

The defendant has no objections to the presentence report, including the sentencing guideline calculations as submitted by U.S. Probation. The defendant is, however, requesting a variance and recommends a sentence of 21 years.

The defendant respectfully requests a 21-year sentence. This is a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth at 18 U.S.C. § 3553 (a)(2). It would:

- Reflect the seriousness of the offense, promote respect for the law, and provide just punishment;

- Afford adequate deterrence to criminal conduct;
- Protect the public from further crimes of the defendant;
- Provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

REASONS FOR A SENTENCE OF 21 YEARS

The court is required to impose a sentence that is sufficient, but not greater than is necessary to comply with the purposes set forth at 18 U.S.C. § 3553(a)(2).

The defendant is requesting a variance or a downward departure based on a difficult childhood and extraordinary suffering as a young person.

LACK OF GUIDANCE AS A YOUTH

Landrigan v. Schriro 441 F.3d 638, 648 (9th Cir. 2006) (“Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems the defendant is less culpable than one without the excuse.”)

Mr. Upton experienced a difficult upbringing. Sadly, Mr. Upton has never met his biological Father. His biological Father separated from Mr. Upton's Mother before Mr. Upton would have gotten a chance to meet his Father.

In addition, Mr. Upton's fate was further compounded when his biological Mother abandoned him when he was only 2 years old. As the PSIR indicates, at the time that his Mother abandoned him, he was living in a car with his Mother. It is unknown what circumstances led to his Mother's plight, but even before his Mother abandoned him, Mr. Upton would often be left in the care of his Uncle Shawn Upton.

1 After his abandonment, Mr. Upton was cared for by his Uncle Shawn Upton.
2 Unfortunately, Mr. Upton's relationship with his Uncle was never good. The
3 normal love and compassion and emotional support that would accompany the
4 relationship between a parent and a child was absent.

5
6 Severe tragedy continued to affect Mr. Upton's life as he was the victim of sex
7 abuse when he was under 10 years of age. Mr. Upton indicates that it was not his
8 Uncle who abused him. However, the subject matter is very difficult for Mr.
9 Upton to discuss in detail. He is still greatly affected by this abuse which has
10 affected him his entire life.

11 At the age of 16 Mr. Upton began using marijuana and alcohol. This eventually
12 led to cocaine use which began at the age of 18. And although he used some other
13 drugs, like Heroin, Opiates, Mushrooms, Acid and Ecstasy, his main drug was
14 methamphetamine. He began to use Methamphetamine at the age of 20 and
15 basically has never stopped using Methamphetamine. He indicates that for the last
16 2 years he has used Methamphetamine on a daily basis up until the time of his
17 arrest in this case.
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19 20 21 SEXUAL ABUSE AS A CHILD

22 U.S. v. Walter, 256 F.3d 891 (9th Cir. 2001)(where D sent threat to the
23 president, district court could downward depart from 41 months sentence because
24 combination of brutal beatings by defendant's father, the introduction to drugs and
25 alcohol by his mother, and, most seriously, the sexual abuse defendant faced at the
26 hands of his cousin, constituted the type of extraordinary circumstances justifying
27 consideration of the psychological effects of childhood abuse and establish
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1 diminished capacity); U.S. v. Brown, 985 F.2d 478 (9th Cir. 1993) (where D offered
2 a letter recounting his childhood of severe abuse and neglect and produced
3 psychologist's report concluding that childhood trauma was the primary cause of D's
4 criminal behavior, court could grant downward departure); U.S. v. Roe, 976 F.2d
5 1216 (9th Cir. 1992) (court clearly erred in holding it did not have discretion to
6 depart downward where defendant's suffered extraordinary sexual abuse as a child);
7 U.S. v. Rivera, 192 F.3d 81, 84 (2d Cir. 1999) ("It seems beyond question that abuse
8 suffered during childhood – at some level of severity – can impair a person's mental
9 and emotional conditions...in extraordinary circumstances...district courts may
10 properly grant a downward departure on the ground that extreme childhood abuse
11 caused mental and emotional conditions that contributed to the defendant's
12 commission of the offense" but D not entitled to one here because he "failed to
13 allege and show, as required for a §5H1.3 departure, that any abuse he may have
14 suffered rose to the extraordinary level that can be assumed to cause mental or
15 emotional pathology"); U.S. v. Pullen, 89 F.3d 368 (7th Cir. 1996) (in light of Koon
16 v. U.S., 518 U.S. 81 (1996), sentence remanded to see if D can establish that
17 childhood abuse was extraordinary to enable judge to exercise discretion to depart
18 downward); see Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., joined
19 by Burger, C.J., White, and O'Connor, J., dissenting) ("It requires no citation of
20 authority to assert that children who are abused in their youth generally face
21 extraordinary problems developing into responsible, productive citizens"); Motley v.
22 Collins, 3 F.3d 781, 792 (5th Cir. 1993) (death penalty) (fact that a doctor did not
23 opine that the murder was likely the result of child abuse did not preclude jurors from
24 making the required inference "after all, the effects of child abuse are not peculiarly
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1 within the province of an expert . . . it requires no citation of authority to assert that
2 children who are abused in their youth generally face extraordinary problems
3 developing into responsible, productive, citizens").

4 As indicated previously, Mr. Upton was sexually abused as child when he was
5 less than 10 years of age. He has never received any counseling for this abuse.
6 It goes without question that a child's psychosocial development is impaired by
7 sexual abuse. A child learns that the world is not a safe place and that he is
8 powerless against adults and older youth. It is well known that sexual abuse in
9 particular brings the additional shame and guilt that virtually all victims take on
10 believing that they must have somehow caused the abuse.
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16 **SENTENCING FACTORS UNDER 18 U.S.C. § 3553 (a) WARRANT A**
17 **SENTENCE OF 21 YEARS**

18 As this court knows, the Sentencing Guidelines are now advisory, rather
19 than mandatory. United States v. Booker, 125 S.Ct. 738, 756-57 (2005). While the
20 Court must consider guideline ranges, the Court is permitted to tailor the sentence
21 in light of other statutory concerns as well. 18 U.S.C. § 3553 (a)(4).
22

23 The purpose of the Sentencing Reform Act is to...reflect the seriousness of
24 the offense, promote respect for the law, provide just punishment, afford adequate
25 deterrence, [and] protect the public. Booker, at 765; 18 U.S.C. § 3553(a)(2). A
26 district court must not accord more weight to the Guidelines than to other factors
27 under § 3553(a).
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1 (1) The nature and circumstances of the offense and the history and
2 characteristics of the defendant.

3 Mr. Upton fully accepts responsibility for his unlawful conduct. He is
4 remorseful for his actions. Mr. Upton's unfortunate background and
5 history has been outlined above.
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8 (2) Need for the sentence to reflect the seriousness of the offense, to
9 promote respect for the law, and to provide just punishment for the
10 offense.
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12 By accepting responsibility, Mr. Upton has shown respect for the law.
13 Moreover, a sentence of 21 years is surely adequate to promote greater
14 respect for the law.
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17 (3). Need for the sentence to afford adequate deterrence to criminal conduct.

18 A 21-year sentence is an extraordinarily lengthy sentence. Given the overall
19 circumstances of the offense and Mr. Upton's personal history, we believe that a
20 sentence of 21 years will afford adequate deterrence to further criminal conduct.
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22 (4). Need to protect the public from further crimes of the defendant.
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24 Given the length of a 21-year sentence, and 40-years of supervised release,
25 we believe that the public will be protected from further crimes of the defendant.
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1 (5). Need for sentence to provide the defendant with needed educational or
2 vocational training, medical care, or other correctional treatment in the
3 most effective manner.

4 A 21-year prison sentence is a significant sentence. It is sufficient time to
5 meet these goals.

6
7 (6). The kinds of sentences available.

8 The court may impose any legal sentence.

9 (7). The advisory guideline range.

10 The advisory guideline range according to U.S. Probation is 360 months.
11 The defendant is asking for a variance and would submit that a sentence of 21-
12 years accomplishes the goals of the Sentencing Reform Act.

13
14 CONCLUSION

15 For the reasons stated above, Mr. Upton asks the court to impose a sentence of
16 21-years.

17 DATED this 1st day of October 2020. Respectfully Submitted,

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19 s/ Ricardo Hernandez
20 Ricardo Hernandez
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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020 Benjamin David Michael Herzog, Assistant United States Attorney, received a copy of the foregoing via ECF notification.

s/ Ricardo Hernandez
Ricardo Hernandez